IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 17

UNITED GAS PIPE LINE COMPANY, *Petitioner,*

v.

MOBILE GAS SERVICE CORPORATION and FEDERAL POWER COMMISSION, *Respondents.*

No. 31

FEDERAL POWER COMMISSION, *Petitioner,*

v.

MOBILE GAS SERVICE CORPORATION.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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MEMORANDUM BRIEF IN SUPPORT OF MOBILE GAS SERVICE CORPORATION FOR THE CITY OF TYLER, TEXAS AND TYLER GAS SERVICE COMPANY AMICI CURIAE

REASONS FOR FILING THIS BRIEF

This Memorandum Brief is filed in support of Mobile Gas Service Corporation pursuant to Rule 42(4) of the Revised Rules of the Supreme Court of the United States.

It is not the purpose herein to argue the issues before the Court on writ of certiorari. That has been well done in the Briefs of the parties. However, the Briefs contain much discussion of the case of *Tyler Gas Service Company and City of Tyler* v. *United Gas Pipe Line Company*, E. D. Texas, Civil No. 1662, affirmed, 247 F. 2d 73. Furthermore, the Court of Appeals for the Third Circuit referred, in its opinion in the *Mobile* case being reviewed, to the District Court's decision in the *Tyler* Case. *Mobile Gas Service Corp.* v. *F.P.C.*, 215 F. 2d 883, 884, fn. 3. It sought to distinguish the *Tyler* Case on three grounds, two of which are based on misunderstandings of fact and all of which are erroneous. Finally, there is pending before the Federal Power Commission a proceeding respecting the rates of United Gas Pipe Line Company for sales of both industrial and domestic gas to Tyler Gas Service Company. The resolution of the issues before this Court in the *Mobile* Case will have relevance and materiality in that proceeding.

For the foregoing reasons it seems appropriate to present to this Court a resumé of the proceedings in the *Tyler* Case before the Courts and the Federal Power Commission and to discuss briefly the basis upon which Tyler Gas and the City of Tyler submit that the Court of Appeals in the *Mobile* Case erred in distinguishing the *Tyler* Case.

THE RELATIONSHIP AMONG CITY, TYLER GAS AND UNITED

Tyler Gas Service Company is a public utility enfranchised by the City of Tyler, Texas, to distribute natural gas in the City. Tyler Gas, like Mobile Gas Service Corporation, purchases all of the gas it

distributes from the United Gas Pipe Line Company. These purchases are made pursuant to a contract first entered into between Tyler Gas and United on November 22, 1940. This contract was amended on May 29, 1946.

The amended contract reduced the rates paid United by Tyler Gas for gas sold for resale for both domestic and industrial use, and committed United not to increase those rates for a period of 10 years. The reasons for the rate reduction were that the franchise of Tyler Gas had expired in 1946 and the City was about to refuse to renew it because it had been informed that another distributing company could be organized to purchase and distribute gas at substantially lower rates.

As the District Court found in the *Tyler* Case, supra, the principal consideration supporting the amended contract was the granting of a new franchise by the City of Tyler to Tyler Gas for a period coincident with the term of the amended contract, 16 years. This franchise was granted by the City only after United expressly agreed in writing with the City to abide the amended contract for 16 years and further agreed to sell gas to the City on the basis provided in the amended contract in the event the City exercised its reserved right against Tyler Gas to acquire its properties. Memorandum Opinion unreported, reproduced at p. 106 et seq. of Record in No. 15,034 in United States Court of Appeals for the Fifth Circuit. The amended contract between United and Tyler Gas was duly filed with the Federal Power Commission and made effective pursuant to Section 4 of the Natural Gas Act.

THE PROCEEDINGS IN THE TYLER CASE

On June 24, 1953, by the same filing with the Federal Power Commission that raised Mobile's rates, Docket G-2210, United proposed increases in both its domestic and industrial rates to Tyler Gas. As in the case of Mobile, the proposed increases in industrial rates became effective on July 25, 1953. The proposed increases in domestic rates were suspended by the Federal Power Commission for the maximum statutory period of five months, but became effective December 25, 1953. A hearing was ordered pursuant to Section 4 (e) of the Natural Gas Act to determine the reasonableness of the proposed increases.

Both the City of Tyler and Tyler Gas intervened in the proceedings before the Federal Power Commission in Docket G-2210. Both of them challenged in their pleadings the legality of United's filing in violation of the amended contract between Tyler Gas and United and the contract between the City and United.

On December 8, 1953, after it had become evident that the issues raised by the City and Tyler Gas in the proceedings in Docket G-2210 would not be determined before the period of suspension expired; the City and Tyler Gas invoked the diversity jurisdiction of the United States District Court for the Eastern District of Texas in a suit for: "(1) a preliminary injunction to restrain United from putting [the domestic rates which had been suspended by the Federal Power Commission] into effect; (2) a judgment declaring the contracts to be in all things valid, subsisting, and enforcible; and (3) enjoining the defendant from proposing or making effective any rates and charges in excess thereof." 217 F. 2d 73, 74.

A hearing on the request for a preliminary injunction was held by the District Court on December 14, 1953. The specific purpose of the hearing and the scope of the issues considered were delineated in the opening statements of counsel. Record, p. 22 et seq. in No. 15,034 in the United States Court of Appeals for the Fifth Circuit. In his opening statement Thomas B. Ramey, counsel for Tyler Gas, stated "that the purpose and sole purpose of this proceeding is to invoke the jurisdiction of this Court of equity to issue a Preliminary Injunction enjoining the Defendant, United Gas Pipe Line Company, from taking any steps to make effective the proposed schedule of rates to be paid for gas sold by the United Gas Pipe Line Company to the Tyler Gas Service Company under existing contracts entered into between those two companies and also confirmed by contract between the United Gas Pipe Line Company and the City of Tyler, ..." Thereupon the Court said: "You want to reserve the status quo?", to which Mr. Ramey replied: "We ask the Court to reserve the status quo from and after the date of expiration of the present suspension order of the Federal Power Commission until such time as the Commission finally decides the issues. That, in substance, is our position."

Counsel for United, in his opening statement, pointed out that the increased industrial rate was then in effect and argued that the Federal Power Commission was an indispensable party if a decree requiring the industrial rate to be withdrawn were to be entered. In response to this Mr. Ramey stated, inter alia, that he recognized that since the industrial rate had already been made effective "we are pre-

termitted" from its consideration by the Court "in our application for temporary injunction." Whereupon the application for a Preliminary Injunction was tried, briefed and argued.

On December 23, 1953, the District Court issued a Memorandum Opinion not only denying the Preliminary Injunction, which was the subject of the hearing, but also dismissing the Complaint for failure to show grounds for equitable relief. The District Court's action was affirmed on appeal. *Tyler Gas Service Company* and *City of Tyler* v. *United Gas Pipe Line Company*, 217 F. 2d 73.

The opinions of both the District Court and the Court of Appeals contain language which the Federal Power Commission and United interpret in their Briefs in this Court as suggesting that United's filing under Section 4 of the Natural Gas Act was proper notwithstanding that it violated the terms of its contracts with the City and with Tyler Gas. However, it is clear that, reading the opinions in the light of the issues tried in the District Court, both Courts based their holding on the ground that the Federal Power Commission "is empowered under and in accordance with the terms of the [Natural Gas] Act to afford relief and that any relief due the plaintiff must be sought" from the Commission. 217 F. 2d 73, 77. Again, in discussing the opinion in the *Mobile* Case being reviewed by this Court, the Court of Appeals said that "we think it plain that the opinion does not conflict with, that indeed it supports and confirms, the views of the district judge: that 'Any relief to which plaintiff may be entitled in the premises must be secured through action of the Commission and not of this Court. The Commission is amply empowered to

give adequate relief"; and that the plaintiffs did not show grounds for equitable relief." 217 F. 2d 73, 78.

That the District Court and the Court of Appeals held only that the City and Tyler Gas had failed to exhaust their administrative remedies is fortified by the fact that, as both Courts knew, the issue of the legality of United's filing proposing increases to Tyler Gas, having been raised in the pleadings of the City and Tyler Gas in Docket G-2210 in the Federal Power Commission, was then pending before the Commission. This holding by both the District Court and the Court of Appeals being the law of the case, neither rehearing in the Court of Appeals nor certiorari from this Court was sought.

The issue of the legality of United's filing as to Tyler Gas is still pending before the Federal Power Commission. The proceeding in Docket G-2210 was in part terminated by Opinion and Order No. 277, issued by the Commission on November 2, 1954. However, that Opinion and Order specifically provided that the applicable domestic rates it prescribed be effective as to Tyler Gas under bond subject to refund, and that the proceedings in Docket G-2210 remain open for the purpose of determining the matters involved and issues presented by the Petitions to intervene of Tyler Gas and the City of Tyler. Opinion and Order No. 277 (Mimeo. p. 21), In Re United Gas Pipe Line Company.

THE DISTINCTIONS BETWEEN THE MOBILE CASE AND THE TYLER CASE DRAWN BY THE COURT OF APPEALS FOR THE THIRD CIRCUIT

The grounds upon which the Court of Appeals for the Third Circuit sought to distinguish the *Mobile* Case from the *Tyler* Case are three. First it said that

challenge in their Complaint in the District Court the increase in the industrial rates. As has been seen, they did.

Be that as it may, the holding of the *Mobile* Case, i.e., that a natural gas company may not ignore its contract rates unless the Commission first determines that the contract rates are unreasonable, is applicable whether those rates be domestic rates subject to suspension or industrial rates not subject to suspension. Consideration of the rationale of the holding requires this conclusion. That rationale is that there is a difference in fact and law between a finding under Section 4 of the Natural Gas Act that a proposed rate is reasonable, a finding that does not imply that the proposed rate is the only reasonable rate, and a finding under Section 5 of the Act that an existing rate is in fact unreasonable.

This difference, a difference of great practical significance, is the root of the *Mobile* holding. This difference has the same practical significance whether the rate is an industrial rate or a domestic rate. The fact that proposed increases in domestic rates may be suspended for five months and thereafter collected subject to refund pending a determination of reasonable rates under Section 4 of the Act is obviously not in any sense a substitute for the requirement that contract rates may not be set aside unless first found to be unreasonable. In the event of a refund the buyer from a natural gas company receives not the difference between the suspended rate and his contract rate but only the difference between the suspended rate and whatever rate less than the suspended rate is found to be reasonable. Thus he is still deprived of his contract rate without a prior, indeed without

any finding that his contract rate is unreasonable. It is this finding that it is submitted the *Mobile* Case correctly holds must precede the abrogation of his contract.

Respectfully,

TROY SMITH
THOMAS B. RAMEY
BRYCE REA, JR.
Counsel for City of Tyler, Texas and Tyler Gas Service Company

Of Counsel:

RAMEY, CALHOUN, BRELSFORD & HULL

IN THE

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OCTOBER TERM, 1954

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UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

MOBILE GAS SERVICE CORPORATION and
FEDERAL POWER COMMISSION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, MOBILE GAS SERVICE CORPORATION, IN OPPOSITION

WILLIAM C. CHANLER,
40 Wall Street,
New York 5, New York,
Attorney for Respondent,
Mobile Gas Service Corporation.

SAMUEL M. JOHNSTON,
DAN T. McCALL, JR.,
P. O. Box 550,
First National Bank Annex,
Mobile 4, Alabama.

ELLIOTT E. VOSE,
GERARD THOMAS,
40 Wall Street,
New York 5, New York.

December 4, 1954.

APPEAL PRINTING CO. INC., 130 CEDAR ST., NEW YORK, WORTH 4-3033

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No. 436

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

MOBILE GAS SERVICE CORPORATION and
FEDERAL POWER COMMISSION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, MOBILE GAS SERVICE CORPORATION, IN OPPOSITION

Opinion Below

Since the filing of the Petition the opinion of the Court of Appeals for the Third Circuit, printed in the Appendix to the Petition (App. 1-16), has been reported at 215 F. 2d 883.

Respondent's Statement of the Case

The relevant facts are fully set forth in the opinion below (215 F. 2d at 884-5, App. 1-4). Briefly, in 1946 Petitioner, United Gas Pipe Line Company (United), entered into a contract to sell gas to respondent, Mobile Gas Service Corporation (Mobile), for resale by it to Ideal

Cement Company for a period of ten years at a rate substantially lower than that fixed by United's existing rate schedule (R. 13-14). In reliance upon this contract, which was duly filed with the Federal Power Commission (Commission), Mobile entered into a contract of resale with Ideal. The Court of Appeals said: "* * * there seems no doubt but that the Ideal Cement account represented important new business to Mobile and to United and that the long range price concession was made in order to obtain it", 215 F. 2d at 889, App. 11). In 1953, United filed with the Federal Power Commission a schedule of proposed rate increases, including an increase in the contract rate (R. 15). The Commission by order denied Mobile's petition that this filing be rejected as unlawful (App. 18-23). As a result, the increase became effective without any hearing as to the reasonableness of the contract, and Mobile has been compelled to pay United 14.5¢ per MCF (the new rate) for gas which it is compelled under its contract with Ideal to resell for 12¢.[1] The Court of Appeals for the Third Circuit reversed the Commission's order, Hastie, J., dissenting. Petitioner asks this Court to review that decision.

The Question Presented

The issue is succinctly stated at the beginning of the opinion below: "In this proceeding to review an order of the Federal Power Commission the basic question is whether the Commission is correct in holding that under the Natural Gas Act a natural gas company can in effect wipe out a filed rate contract simply by filing an increased rate schedule. Substantially that is what the

[1] A rate contract is valid and binding under the laws of the State of Alabama. See *Birmingham Elec. Co. v. Alabama Public Service Commission*, 233 Ala. 675, 173 So. 19 (1937).

Commission considers to have happened to petitioner's contract with intervener" (215 F. 2d at 884, App. 1).

Of course, if such a contract as that here in issue can be wiped out by the unilateral filing of an increased rate, it means that any such contract is *nudum pactum* and void. Thus the issue resolves itself into a simple question of statutory construction: Did the passage of the Natural Gas Act automatically abrogate the right to enter into private rate contracts, or did it expressly delegate to the Federal Power Commission the power to abrogate such contracts after a hearing and finding that the public interest so required?

Argument

Private rate contracts, like any other private property rights, are subject to the paramount power of the State or Federal Government to abrogate or modify them when the public interest so requires. This power may be exercised directly by the legislature itself (*Armour Packing Co.* v. *United States*, 209 U. S. 56, 28 S. Ct. 428 (1907)), or the legislature may delegate the power to an administrative body (*Wichita R. R.* v. *Pub. Util. Comm.*, 260 U. S. 48, 43 S. Ct. 51 (1922)). When the legislature delegates the power to an administrative body, it can only be exercised in accordance with the standards and subject to the limitations prescribed by the legislature. Indeed, the legislature may not delegate such a power without prescribing standards governing its exercise, for that would be an unconstitutional delegation of legislative power (*Wichita R. R.* v. *Pub. Util. Comm.*, *supra*).

It is our contention, sustained by the Court below, that when Congress adopted the Natural Gas Act it did not thereby directly exercise its power to abrogate contracts, but, on the contrary, expressly delegated that power to the Federal Power Commission, to be exercised by it only

after a hearing and finding upon substantial evidence that the public interest required such modification.

I. Section 5(a) of the Gas Act is a clear delegation of power to the Federal Power Commission to abrogate or modify any rate contract upon a hearing and finding that it is unjust, unreasonable, unduly discriminatory, or preferential.

The pertinent provisions of the Natural Gas Act (Act of June 21, 1938, 52 Stat. 821 *et seq.*; 15 U.S.C. §§717 *et seq.*; as amended) are Sections 4 and 5, which are set forth in full in the Appendix to the Petition (App. 24-7). Section 5(a) provides in part as follows:

> "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate * * * or *contract* affecting such rate * * * is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate * * * or *contract* to be thereafter observed and in force, and shall fix the same by order * * *." (Italics supplied.)

The only possible interpretation of this provision is that it constitutes an express delegation by Congress to the Federal Power Commission of the power to set aside or modify contracts after a hearing and finding that they are unjust, unreasonable, etc., and to fix just and reasonable contract provisions in lieu thereof. It requires no citation of authority to establish the proposition that when Congress uses the word "contract" it means a contract in the legal sense: an agreement binding upon both parties thereto. Surely Congress cannot be deemed to have used the word "contract" to describe a piece of paper denominated a "contract" which is in fact void and unenforceable.

If the Act were construed as automatically abrogating all rate contracts, this provision would be meaningless. It follows that a duly filed rate contract such as that here in issue is valid and binding until and unless set aside after a hearing and finding as provided in Section 5(a). And so the courts have repeatedly held. See cases cited at pages 9 and 10, *infra*.

II. The provisions of Section 4 neither obligate nor authorize a gas company to initiate changes in violation of a contract.

Petitioner bases its attack on the decision below largely on the proposition that as it reads the statute, "* * * the natural gas company is obligated to initiate rate changes for Commission consideration pursuant to Section 4(d) whenever and as often as necessary to meet the obligation of Section 4(a) that all rates at all times shall be 'just and reasonable'" (Pet. 8-9). Petitioner argues from this premise that a natural gas company has no power to enter into a contract which would prevent it from carrying out its alleged obligation to initiate rate changes under Section 4(d) (Pet. 9, 19).

We see nothing in Sections 4 or 5, nor elsewhere in the Act, which imposes any obligation on a natural gas company to initiate rate changes in violation of a duly filed rate contract. The only obligation placed upon the company is to file schedules of all existing rates and contracts, as provided in Section 4(c). The provision relied on by Petitioner in 4(d) is cast in words of prohibition, and not of obligation:

> "Unless the Commission otherwise orders, no change shall be made by any natural gas company in any such [i.e., filed] rate, * * * or in any * * * contract relating thereto, except after thirty days notice to the Commission and to

> the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the changes or charges to be made in the schedule or schedules then in force * * *." (App. 25)

We do not see how this language can possibly be construed as imposing an obligation on a natural gas company to initiate changes in a contract rate. It merely forbids a filed rate schedule or contract from being changed without due notice to the Commission and to the public, and is followed by the provisions of Section 4(e) providing for hearings as to the reasonableness of the proposed change, suspension pending hearings, posting bonds, etc.

As was held by this Court in *Wichita R. R. v. Pub. Util. Comm.*, 260 U. S. 48, 43 S. Ct. 51 (1922), in holding that a contract rate could not be increased by a mere filing under a very similar provision contained in the Kansas Public Utility Law, such a provision "* * * is made necessary only to prevent changing schedules without notice to the Commission and thus to secure a proper supervision of schedules" (260 U. S. at 56-7). Obviously, the requirement in Section 4(c) that all existing schedules and contracts shall be filed would be futile, if private parties could change the filed rates at any time by secret agreement. But surely this provision cannot be tortured into either imposing an obligation on, or even authorizing, a utility company to abrogate its solemn contractual obligations by merely filing a schedule of higher rates. As held by this Court in the recent case of *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U. S. 239, 74 S. Ct. 487 (1954), in overruling the Commission's contention that the Federal Water Power Act abolished preexisting water rights:

> "* * * To convert this Act from a regulatory Act to one automatically abolishing preexisting water rights on a nationwide scale calls for a convincing explanation of that purpose. We find none." (347 U. S. 239 at 252-3)

Nor do we find any such explanation in the Gas Act.

Moreover, we think the provisions of Sections 4(c) and (d) were written into the Gas Act for the express purpose of differentiating it from the provisions of the Elkins Act, which was construed by this Court in *Armour Packing Co. v. United States*, 209 U. S. 56, 28 S. Ct. 428 (1907), as outlawing all private unfiled rate contracts for the transportation of goods in interstate commerce. In support of this determination this Court there pointed out:

> "* * * *There is no provision* [in the Interstate Commerce Act] *for the filing of contracts* with shippers and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart." (209 U. S. 56 at 81) (Italics supplied.)

In discussing Armour's suggestion that as a matter of policy rate contracts should not be outlawed the Court said:

> "It may be that such contracts should be recognized, giving stability to rates for limited periods; *that the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done.* But, as we have said, such considerations address themselves to Congress, not to the courts." (209 U. S. 56 at 82) (Italics supplied.)

We suggest that such considerations did address themselves to Congress when, in drafting the Natural Gas Act, it departed from the provisions of the Interstate Commerce Act and expressly provided that all contracts, and all proposed changes in contracts, should be filed and published, so that the rate stipulated would be known and open to all. The reason for this differentiation is that in the gas industry sales of gas for industrial use are "in direct competition with other forms of fuel."[2] Unless binding long term contracts at fixed rates may be entered into, it would be impossible for the gas industry to compete with other sources of industrial power.

III. As construed by the Court below, the Natural Gas Act sets forth a clear and simple scheme of regulation, which is supported by the overwhelming weight of authority.

We submit that the regulatory scheme set forth in the Act, as construed by the Court below, in so far as it relates to such a rate contract as the one here in issue, is clear and simple. Moreover, a consideration of that scheme conclusively refutes Petitioner's contention that the Court's decision places contracts beyond the reach of the regulatory powers of the Commission. On the contrary, the Act provides that any rate contract shall be twice subjected to regulatory action by the Commission: First, under Section 4(e) at the time that it is filed, and secondly, under Section 5(a) at any time thereafter. By way of illustration: In 1946 when the contract was filed under Section 4(d) it could have been set aside by the Commission after a hearing under Section 4(e) if found to be discriminatory or otherwise unlawful. The Commission having permitted it to become effective without

[2] Vol. 81, Part 6, 75th Congress, 1st Session, p. 6725; Congressional Record July 1, 1937.

a hearing, the contract became the legal filed rate, which because it was embodied in a contract could thereafter be changed in either of two ways: (1) By agreement of the parties, in which event the proposed change must be filed under Section 4(d), subject again to the power of the Commission to reject or modify it after a hearing and finding of unreasonableness under Section 4(e); or (2) by the Commission after a hearing under Section 5(a), and a finding that the contract is so unjust, unreasonable, unduly discriminatory or preferential that the public interest requires that it be set aside. Thus the contract is at all times subject to the control of the Commission, and there is no reason why the public utility should have the right to abrogate its own contract unilaterally.

That the foregoing is the correct construction of Sections 4 and 5 of the Natural Gas Act is abundantly apparent from the controlling cases cited in the opinion below, in each of which the court construed the Natural Gas Act or a similar statute as not automatically overthrowing rate contracts, but rather as delegating to the appropriate Commission the power to abrogate such contracts upon a finding that they are against the public interest:

Wichita R. R. v. *Pub. Util. Comm.*, 260 U. S. 48 (1922);

Arkansas Natural Gas Co. v. *Railroad Commission*, 261 U. S. 379 (1923);

Southern Utilities Co. v. *Palatka*, 268 U. S. 232 (1925);

Hinkel Dry Goods Co. v. *Wichison Industrial Gas Co.*, 64 F. 2d 881 (10th Cir. 1933);

Colorado Interstate Gas Co. v. *Federal Power Commission*, 142 F. 2d 943 (10th Cir., 1944);

Attleboro Steam & Electric Co. v. *Narragansett Electric Lighting Co.*, 295 Fed. 895 (D.C.R.I. 1924);

Kaul v. American Independent Telephone Co., 95 Kan. 1, 147 Pac. 1130 (1915);

Railroad & Light Co. v. Court of Industrial Relations, 113 Kan. 217, 214 Pac. 796 (1923).

The inherent weakness in Petitioner's position is perhaps best illustrated by the fact that despite the formidable array of fifty-seven cases cited in the Petition it does not mention one of the foregoing cases, which are the only ones dealing directly with the question in issue, and each of which squarely refutes Petitioner's contentions.

Moreover, we submit that the fact that the courts have so repeatedly prescribed the procedure hereinabove outlined is the clearest proof of the lack of substance in Petitioner's repeated cries of distress at the alleged practical difficulties involved in carrying out that procedure.

That as recently as 1948 the Commission itself did not consider that rate contracts either interfered unduly with the Commission's performance of its regulatory functions, or that they were outlawed by the Act, is clear from the Commission's interpretation of the effect of its Order No. 144 issued October 30, 1948, which directed that all existing contracts and rate schedules be converted from a percentage to a dollars and cents basis, and to which Petitioner devotes so much attention in the footnotes on pages 4 and 5 of the Petition:

> "The regulation neither requires that existing contracts remain in effect nor that they be changed. It is permissive only." (Federal Power Commission Order issued December 21, 1948, CCH Utilities Law Reporter, Federal Transfer Binder, 1947-1951 Decisions, ¶9090.)

IV. There is neither an inter-circuit nor an intra-circuit conflict with the decision here sought to be reviewed.

In its effort to persuade the Court to grant its writ Petitioner endeavors to show the existence of both inter-circuit and intra-circuit conflicts (Pet. 19-24). But the decisions cited by Petitioner (Pet. 19-20) as creating a conflict between circuits are clearly not germane to the question passed upon by the Court below. The decision of the Third Circuit in *Mississippi River Fuel Corp. v. Federal Power Commission*, 202 F. 2d 899 (1953), relied on as the source of the "intra-circuit" conflict (Pet. 21-4) is fully distinguished by the Court itself (245 F. 2d at 891-2, App. 15).

Since the foregoing was written the Court of Appeals for the Fifth Circuit has, on November 24, 1954, decided Case No. 15,034, *Tyler Gas Service Company and The City of Tyler, Texas, appellants, versus United Gas Pipe Line Company, appellee*,[a] and counsel for Petitioner has stated that he proposes to file a reply memorandum contending that this decision is "squarely in conflict" with the decision here sought to be reviewed.

The short answer to any such contention is that the *Tyler* case was commenced as a collateral proceeding brought in the District Court to enjoin United, the present Petitioner, from taking certain action before the Commission in violation of its contract with Tyler. The Commission was not even made a party to that proceeding. As we read the opinions, both of the Fifth Circuit and of the District Court, the burden of those decisions is that the appellants have failed to exhaust their remedies before the Federal Power Commission. With this we are in-

[a] The opinion is printed as an Appendix to this brief (*i.e.*, Resp. App.).

clined to agree. It seems to us that the proper procedure for the appellants in the *Tuler* case was, and still is, to petition the Commission to reject the filing on the ground that it is in violation of the appellants' contract rights, as the present Respondent, Mobile, did in the instant case, and to resort to the courts only if that petition is denied.

That the Fifth Circuit did not intend to disagree with the decision here sought to be reviewed is apparent from the concluding paragraphs of its opinion commenting on that decision:

> "Assuming, without deciding, that the opinion of the majority is right, that of Judge Hastie, the dissenting member, is wrong, we think it plain that the opinion does not conflict with, that indeed it supports and confirms, the views of the district judge: that 'Any relief to which plaintiff may be entitled in the premises must be secured through action of the commission and not of this court. The commission is amply empowered to give adequate relief': * * *." (Resp. App. 9a-10a)

No doubt petitioner will emphasize the statement of the Fifth Circuit that:

> "We find ourselves, * * * in agreement with the well considered and expressed views of the district judge, that the defendant, a public utility, may not by private contract fix binding long term rates either too high or too low, for if too high, they would penalize the particular consumers affected, or if too low they might jeopardize the ability to serve the public and in both situations they would be the result of action in contravention, if not in defiance, of the Natural Gas Act, and in particular Section 4 thereof, and of the authority and jurisdiction of the Federal Power Commission." (Resp. App. 8a)

We quite agree that a private contract fixing rates so high that they would penalize the consumers affected or so low

as to jeopardize the company's ability to serve the public would be in violation of the requirement of Section 4(a) that all rates "shall be just and reasonable". We think it is also apparent from what has been said heretofore that in such a situation the Commission has not only the power, but the duty, after a hearing either under Section 4(e) at the time the contract is filed, or under Section 5(a) at any time thereafter, and a finding that the contract rate will produce such results, to set it aside. But in any event, this statement of the Court of Appeals for the Fifth Circuit in the *Tyler* case is clearly a mere dictum.

We see no conflict between that decision and the decision here sought to be reviewed.

V. Petitioner's contention that the Court below erroneously construed the Commission's power to make refunds under Section 4(e) is not even presented on this record.

Petitioner's contention that the Court below improperly holds that the Commission has power under Section 4(e) to order reparations or refunds would seem to fly squarely in the face of the clear statement in the opinion below that this question was not reached for the reason that:

> . . . Since we are specifically holding that the pertinent part of the order of July 10, 1953 was void because the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates any monies, if any, collected on the basis of the erroneous order were unlawfully collected and should be returned to Mobile." (215 F. 2d at 892, App. 16)

CONCLUSION

The decision sought to be reviewed is so clearly in accordance with the plain language of the statute and with the controlling authorities that the petition for certiorari should be denied.

Respectfully submitted,

WILLIAM C. CHANLER,
Attorney for Respondent,
Mobile Gas Service Corporation.

SAMUEL M. JOHNSTON,
DAN T. MCCALL, JR.,
ELLIOTT E. VOSE,
GERARD THOMAS.

December 4, 1954.

APPENDIX

(Opinion of the U. S. Court of Appeals for the Fifth Circuit)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15034

TYLER GAS SERVICE COMPANY and THE CITY OF TYLER, TEXAS,

Appellants,

versus

UNITED GAS PIPE LINE COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

(November 24, 1954.)

Before—HUTCHESON, Chief Judge, and BORAH and RIVES, Circuit Judges.

HUTCHESON, Chief Judge: Alleging that United Gas Pipe Line Company, a "Natural Gas Company", was under binding term contracts as to rates with the City of Tyler and the Tyler Gas Service Company, the operators of a system for the local distribution and sale of gas and the holder of a gas franchise from the city, and that, in

violation of their express covenants, it had filed with the Federal Power Commission and was proposing, at the end of the suspension period, to put into effect a schedule of higher rates. Tyler and Tyler Gas filed this suit seeking: (1) a preliminary injunction to restrain United from putting the schedule into effect; (2) a judgment declaring the contracts to be in all things valid, subsisting, and enforcible; and (3) enjoining the defendant from proposing or making effective any rates and charges in excess thereof.

The defendant moved for a dismissal of the complaint for want of jurisdiction and for want of equity and failure to state a claim because it in effect seeks to enjoin compliance by the defendant with the provisions of the Natural Gas Act,[1] and more particularly Section 4 thereof,[2] and because it in effect bases its claim to declaratory and injunctive relief upon the theory and contention that the contracts relied on override and nullify the duties, powers, obligations and procedures imposed and conferred by the act on defendant as a natural gas company under the Act, indeed override the provisions of the Act itself. In addition, it moved for a dismissal as to the City of Tyler for the reason that the city was not a party to the

[1] 15 U.S.C., Chapt. 15B, Sec. 717 to 717w.

[2] "Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published." 15 U.S.C.; Sec. 717c(d).

contracts and had no capacity to sue on or in respect of them, and filed a lengthy answer, which, because of the manner in which the case went off, it is not necessary to here set out.

The matter thereafter coming on for hearing on the application for preliminary injunction, the district judge filed a carefully worded opinion in which, summing up the facts, as to which there is no serious dispute, and

[a] "The facts, which are largely without dispute, arise in the following fashion. The original contract between United and Tyler Gas was dated November 22, 1940, and provided for a price to Tyler Gas of 22½c per thousand cubic feet for gas to be resold for domestic use, and for gas for resale by Tyler Gas to industrial consumers of 80% of the proceeds received by Tyler Gas from such sales. These were the rates paid from 1940 to 1946. In 1946, the franchise which had been granted to Tyler Gas by City expired. At that time, natural gas was in abundant supply in the vicinity of the City of Tyler by reason of the proximity of a number of producing fields. As the expiration of Tyler Gas's franchise neared, a group of citizens approached the City Commission with the proposal that the franchise of Tyler Gas be not renewed; that a new distributing company be organized, which would procure its gas from new sources, at a price less than Tyler Gas paid United and that greatly reduced rates thus might be made available to the consumers. The City Commission was quite receptive to this suggestion, and for a period of several months had it under serious consideration. Tyler Gas, of course, desired to have its franchise renewed, and United was anxious to retain this market for its product. After considerable haggling over price, and being fully conversant with these facts, United consented to reduce its price to Tyler Gas of gas for domestic consumption from 22½c to 12c Mcf if City would renew the Tyler Gas franchise. A proposed new franchise for Tyler Gas was prepared, specifying the rates it would charge its consumers. These proposed rates were predicated on a rate of 12c from United to Tyler Gas for domestic gas and 80% of the amount received by Tyler Gas, though in no event less than 7.2c for industrial gas. The franchise provided further that under certain contingencies the City might take over and acquire the property and distributing system of Tyler Gas. In an abundance of caution and before approving such franchise, bottomed as it was, on the proposed reduction in rates from United to Tyler Gas, the City Council requested of United that United commit itself in writing to such proposal. Pursuant thereto, on April 3, 1946, United addressed a letter to City wherein United agreed to the proposed rates to be

discussing the applicable law, he held: that federal jurisdiction existed by reason of diversity and jurisdictional amount; that United is a natural gas company subject to the act; that being such it cannot by private contract fix binding long term future rates; and that plaintiffs must,

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charged Tyler Gas; agreed that such rates would be the maximum rates which United would charge Tyler Gas for a period of sixteen years (subject only to increase in the event of imposition of certain taxes, not material here); and agreed that in the event City exercised its right to acquire the properties of Tyler Gas, then United would thereafter sell to City on the same basis and pursuant to the same contractual provisions. In reliance thereon, the proponents of the new and competing company withdrew the application for franchise, the City renewed the franchise of Tyler Gas for a period approximating the life of the contract, and the original contract of 1940 between United and Tyler Gas was amended, whereby the new rates were fixed at the agreed figures.

"During all of this time, United was subject to the jurisdiction of the Federal Power Commission under the terms of the Natural Gas Act. Pursuant thereto and in compliance with the rules and practices of the Commission, the amendment to the contract was filed with the Commission. That body permitted such filing and ordered such rates to become effective. By virtue thereof, these contract rates were charged and collected from 1946 until July 1, 1952.

"About July 1, 1952, United filed with the Commission a schedule of rates (not those now in issue) which modified slightly the contract rates which theretofore had been in effect. By the conversion tariff [so called because it converted United's schedule of rates from contract to tariff form as required by rules of the Commission], United requested a reduction from 12¢ to 11.2¢ per Mcf for domestic gas sold to Tyler Gas and an increase from 7.2¢ to 7.5¢ per Mcf for industrial gas.

"Tyler Gas did not consent to this change, and protested to the Commission. In its protest, it stressed the same facts relied on here, namely, that the increase would constitute a violation of the terms of the existing contract, and that Tyler Gas was committed by its franchise to a rate schedule with the customers, predicated upon the contract rates with United, and that it would suffer irreparable injury were such rates with United increased. However, by order dated July 31, 1952, the Commission allowed the conversion tariff to become effective. No appeal or judicial review under Sec. 19 of the Act was taken from such order.

"On June 24, 1953, United filed with the Commission another revision of its schedule or rates (those here in issue). By the terms thereof, domestic gas would be sold at a price of 20¢ per Mcf, and industrial gas at a price of 13¢ per Mcf. This would constitute an

consistent construction and practice. It raises questions of importance to future administration and regulation under the Natural Gas Act. We intend, substantially before February 4, 1955, the date to which the time has been extended for a petition by the Government, to file a petition for a writ of certiorari on behalf of the Commission seeking review by this Court of the judgment of the Third Circuit. For these reasons, we urge this Court to grant the instant petition for a writ of certiorari.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

WILLARD W. GATCHELL,
General Counsel
Federal Power Commission.

DECEMBER 1954.

therefore, seek such relief as they may be entitled to under the statute from the commission and not from the court.

So holding, he denied the preliminary injunction and dismissed the bill for want of equity, and plaintiffs have appealed.

Here, while conceding that the commission on final hearing may fix reasonable rates lower than the contract fixes them, appellants insist: that unless and until the contracts sued on are set aside for some invalidity, or after a hearing before the Federal Power Commission, the contract rates are found by the commission to be unreasonable and are set aside, the contract and the rates they fix are controlling upon the parties to them; and that they may not be rendered null and ineffective by the unilateral action of United in filing with the Federal Power Commission a new schedule with lower rates.

In support of their view, that this cannot be done and that the court erred in denying the preliminary injune-

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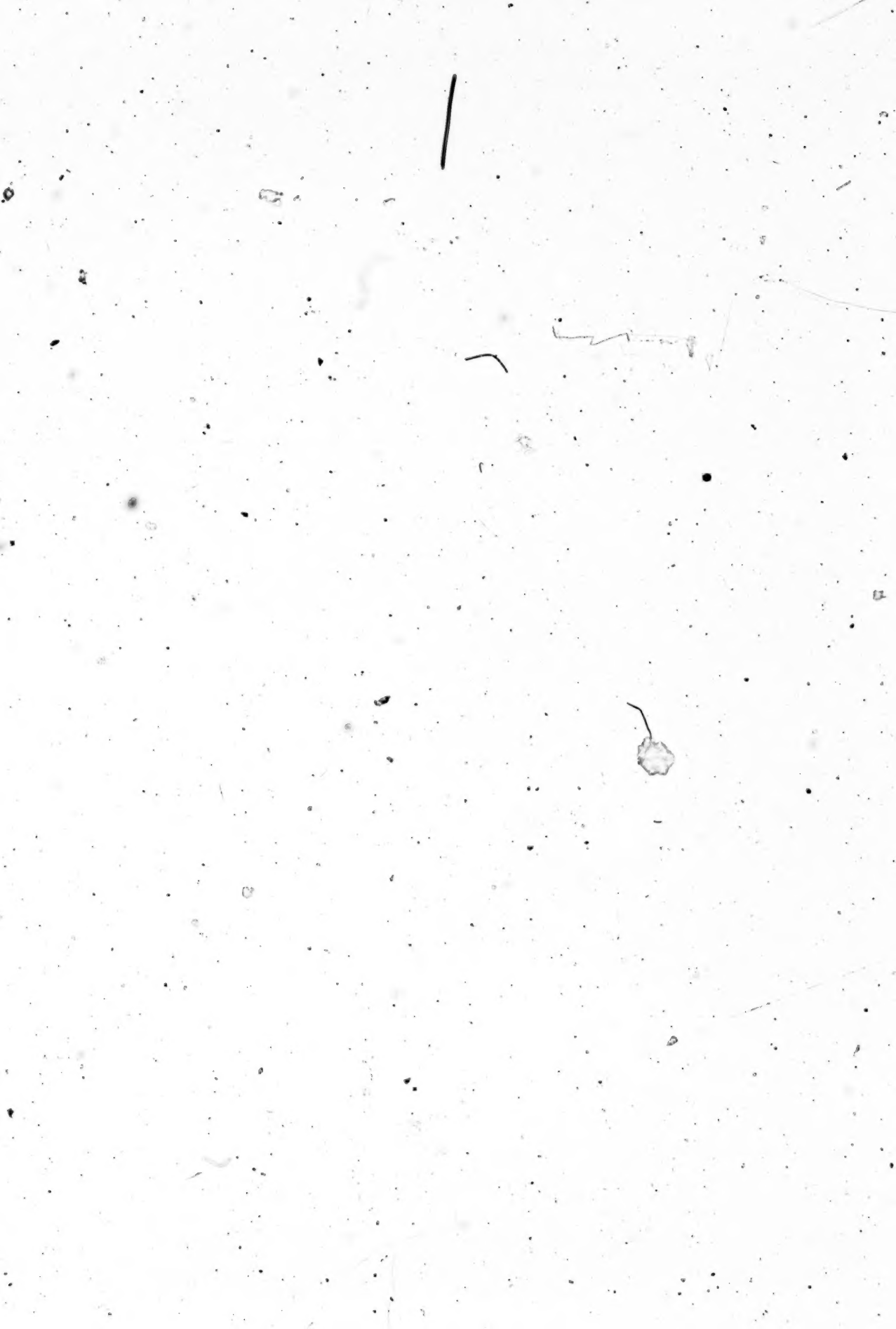
increase of some 70% over and above the rates fixed by the contract amendment of 1946.

"Upon the filing of the new proposal, by order of July 10, 1953, the Commission set a hearing for July 20, 1953, to consider the lawfulness of such rates; and consolidated a number of proceedings involving United's rate structure. Both Tyler Gas and City sought and secured leave to intervene in this proceeding (Federal Power Commission Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210, 'In the Matters of United Gas Pipe Line Co.') in order to oppose such proposed increase. The effective date of such proposed rates was suspended, and the use thereof deferred, pending hearing, until Dec. 25, 1953, except insofar as same applied to industrial gas, which proposed schedule was permitted to become effective July 25, 1953. The explanation for the foregoing no doubt lies in the fact that pursuant to Section 4(e) of the Act, the Commission is empowered to suspend the operation of proposed increase in rates for sale of domestic gas, but not for a longer period than five months beyond the time when it would otherwise go into effect. This five month period expired Dec. 25, 1953. Pursuant to the same section of the Act, the Commission enjoys no such power to suspend the proposed rate for the sale of industrial gas; hence its effective date was fixed at July 25, 1953.

* * *"



tion and dismissing the complaint for want of equity, appellants, in eight specifications of error,[4] which ring the changes on what it claims is the fundamental error of the trial court, attack its holding that a public utility company may, by the simple expedient of filing a revised schedule with the Federal Power Commission, without a full hearing before and a finding by the Commission that such contract rates are unjust, unreasonable, or unlawful, disregard its solemn contracts fixing maximum rates.

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[4] "I. The Court erred in holding that the Defendant was not precluded by its contracts with plaintiffs from invoking the provisions of the Natural Gas Act to increase gas rates provided in such contracts, in advance of a full hearing and final determination by the Federal Power Commission;

"II. The Court erred in refusing to enjoin Defendant from taking steps permitted by the Natural Gas Act to make effective increased gas rates charged Plaintiff Tyler Gas Service Company, in advance of a full hearing and final determination by the Federal Power Commission;

"III. The Court erred in holding that the provisions in the contracts between Plaintiffs and Defendant fixing maximum rates for gas were subject to abrogation, even though no proof was made that same was in the public interest;

"IV. The Court erred in holding that the Defendant was authorized under the Natural Gas Act by unilateral action to increase gas rates charged Tyler Gas Service Company in contravention of the contracts between Plaintiffs and Defendant;

"V. The Court erred in refusing to enjoin Defendant from violating its contract with, and representation to, the City of Tyler that during a period of sixteen years Defendant would sell gas to Tyler Gas Service Company (or to the City of Tyler if it should acquire the property of said Company) at rates not in excess of stipulated maximum rates;

"VI. The Court erred in holding that by virtue of the provisions of the Natural Gas Act the Court was without power to grant the relief sought by Plaintiffs;

"VII. The Court erred in holding that only the Federal Power Commission is authorized to grant the relief sought by the Plaintiffs herein;

"VIII. The Court erred in dismissing the Complaint for failure to show grounds for equitable relief."

Moving forward under these specifications, and conceding that a contract fixing utility rates is deemed to have been made subject to the sovereign power of the government to alter it under proper circumstances; appellants insisting that it is not void but only voidable, quote from Corpus Juris Secundum, Vol. 73, pp. 1012-1013, where it is said:

> "Such a contract is, however, voidable only in that it can not stand against modification by competent authority; and it is obligatory on the parties until abrogated by the state, failing only when the rate is altered or a definite rate is fixed."

and from 43 Am. Jur. page 639:

> "Until the legislature or other body having the right to prescribe rates to be charged by public utilities has exercised this power, the rates are subject to contract between the corporation and its patrons, and such contracts will be deemed valid by the courts, and may be enforced by an appropriate mode."

Proceeding from the premises these contentions and citations supply, appellants insist: that Section 4, subd. (d) and (e) of the Natural Gas Act do not authorize a natural gas company to increase rates fixed by contract solely by its own action in filing a new schedule with the commission; that this can be done only after a full hearing and determination that the contract rates are not in the public interest because unjust, unreasonable, or unlawful.

Citing in support *Colorado Interstate Co. v. Federal Power Commission*, 142 F(2) 943, and insisting that nothing in Sec. 4, 4(e) and 5(a) of the Natural Gas Act is inconsistent therewith, the appellants urge upon us that the district judge erred in refusing interlocutory

equitable relief and in dismissing the bill for want of equity.

We do not think so. We find ourselves, on the contrary, in agreement with the well considered and expressed views of the district judge, that the defendant, a public utility, may not by private contract fix binding long term rates either too high or too low, for if too high they would penalize the particular consumers affected; or if too low they might jeopardize the ability to serve the public and in both situations they would be the result of action in contravention, if not in defiance, of the Natural Gas Act, and in particular Section 4 thereof, and of the authority and jurisdiction of the Federal Power Commission.

Based upon these views, he thought, as we do, that the commission is empowered under and in accordance with the terms of the Act to afford relief and that any relief due the plaintiff must be sought from the commission and under and in accordance with the Act.

So thinking, he rejected, as we reject, the plaintiff's view that the district court could and should grant the relief asked, (1) an injunction prohibiting United from proceeding under Section 4 of the Act, and (2) a decree in effect requiring it to specifically perform the contract sued on, the Act and its proceeding under the Act to the contrary notwithstanding.

By supplemental brief, appellants urge upon us that the decision and judgment of the court below, that plaintiffs could not resort to the courts for relief but were remitted to the remedies provided by and under the Natural Gas Act, was a holding in effect that the United can by purely unilateral action, disregarding indeed nullifying its current rates, initiate higher ones.

As the district judge correctly pointed out in his opinion, this is not a correct, it is an incorrect, characterization of United's action in filing its schedule. Saying, "The answer to this contention, which at first blush is an appealing one, lies in the fact that this is not a unilateral action by United in disregard of its contract rates.", the district judge correctly declared that United has but followed the procedure prescribed by Section 4 of the Act, and that when the schedule became effective at the end of the suspension period, this would be not contrary but pursuant to the statutory scheme. So pointing, he correctly held that if he could and should restrain United from taking any of the preliminary steps provided by the statute, he should, as plaintiffs pray, restrain them altogether from abrogating or modifying the contract rates, and this, as Sections 4(d) and (e) of the Act make plain, the court cannot do.

Finally, attaching to their supplemental brief a copy of the opinion of the Court of Appeals for the Third Circuit, in *Mobile Gas Service Co.* v. *Federal Power Commission* (Filed 9-7-54), appellants invoke as authority for their contention below and here, the majority opinion of that court holding that, under Section 4(d) of the Act, "The commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the contract rates."

Assuming, without deciding, that the opinion of the majority is right, that of Judge Hastie, the dissenting member, is wrong, we think it plain that the opinion does not conflict with, that indeed it supports and confirms, the views of the district judge: that "Any relief to which plaintiff may be entitled in the premises must be secured through action of the commission and not of

this court. The commission is amply empowered to give adequate relief."; and that the plaintiffs did not show grounds for equitable relief.

The judgment appealed from is AFFIRMED.

A True Copy:
Teste:

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Clerk of the United States Court of Appeals for the Fifth Circuit.